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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 JOSUE ROMERO,

4 Plaintiff,

5 v.

20 CV 7422 (JMF)  
Telephone Decision

6 ADAGIO TEAS, INC.,

7 Defendant.

8 -----x

New York, N.Y.  
July 7, 2021  
3:18 p.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 District Judge

13 APPEARANCES VIA TELECONFERENCE

14 COHEN & MIZRAHI, LLP  
15 Attorneys for Plaintiff  
16 BY: JOSEPH H. MIZRAHI  
WILLIAM DOWNES

17 LAW OFFICES OF LAURA E. NEISH  
Attorneys for Defendant  
18 BY: LAURA ELIZABETH NEISH

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(The Court and all parties appearing telephonically)

THE COURT: Good afternoon. This is Judge Furman.

(Case called)

Before I take appearances from counsel, a couple of reminders. No. 1, please mute your phones, if you can, to ensure there's no background noise distraction. Remember to unmute if or when you want to say something. When you say something, make sure that what you first say is your name so the court reporter and I are clear on who is speaking. Reminder, this is a public conference as it would be if we were in open court, and a reminder that no one may record or otherwise rebroadcast the conference.

I have a court reporter here, given the decision that I plan to render on the motion, but once I'm done with that, unless counsel believes that we should remain on the record, I'd be prepared to go off the record, but we can revisit that in short order.

Let me take appearances, beginning with counsel for plaintiff.

MR. MIZRAHI: Good afternoon, your Honor. This is Joseph Mizrahi for plaintiff. I'm joined by my colleague, William Downes.

MR. DOWNES: Good afternoon, your Honor.

THE COURT: Good afternoon.

And counsel for defendant?

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1 MS. NEISH: Good afternoon, your Honor. Laura Neish  
2 from the Law Offices of Laura E. Neish for defendant.

3 THE COURT: Good afternoon to you. Ms. Neish, I have  
4 you listed as Zuckerman, Spaeder. Are you no longer with that  
5 firm?

6 MS. NEISH: I'm no longer with them, and I have  
7 reached out to ECF help desk to try to get that corrected. I  
8 was able to update it through Pacer, but it is not, for some  
9 reason, updating through the Southern District website; so I'm  
10 going to follow up with them about that.

11 THE COURT: If you can make sure that the information  
12 is accurate, that will be helpful, and contact the help desk if  
13 you need.

14 All right. I will start with my decision on the  
15 motion. My bottom-line order on June 25th, 2021, I denied  
16 defendant's 12(b)(1) motion for reasons that I would explain  
17 today. The motion raised two intertwined arguments. First,  
18 the plaintiff's claim is moot; and second, that plaintiff lacks  
19 standing because he failed to suffer a past injury or a threat  
20 of repeated injury. See, for example, *Friends of the Earth,*  
21 *Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.  
22 167, 170 (2000). It describes mootness as "the doctrine of  
23 standing set in a time frame").

24 The mootness argument can swiftly be rejected. For  
25 one thing, the case generally becomes moot when "the issues in

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1 dispute between the parties are no longer live." *Lillbask ex*  
2 *rel. Mauclair v. State of Connecticut Department of Education*,  
3 397 F.3d 77 at 84 (2d Cir. 2005). That is, as Adagio's own  
4 brief acknowledges, mootness is based on "intervening  
5 circumstances," that is, developments after the filing of the  
6 complaint. That comes from pages 6 to 8 of Adagio's brief.

7 Here, unlike in many ADA cases litigated on mootness  
8 grounds, defendant does not argue that it altered, let alone  
9 remedied, its website after the plaintiff filed suit. Instead,  
10 it argues that the website, as it existed on the day plaintiff  
11 allegedly visited it in August 2020, before the filing of the  
12 complaint, that it posed no barriers to the plaintiff's access.  
13 That argument is more of a standing argument than a mootness  
14 argument.

15 In any event, whether construed as a standing argument  
16 or a mootness argument, the argument cannot be resolved at this  
17 juncture. First, I will not entertain Adagio's argument to the  
18 extent that it relies on plaintiff's IP address, which was  
19 obtained in the context of the court-annexed mediation. See  
20 page 4 and note 3 of defendant's brief, which is at ECF No. 20.  
21 See also, ECF No. 21, paragraph 7.

22 The rules and procedures governing the court-annexed  
23 mediation program, which are available on the court's website,  
24 make crystal clear that that communication was to be  
25 confidential, and I presume that Adagio signed the standard

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1 agreement to that effect, as is customary. In light of that,  
2 the use of the IP address at this stage of the proceedings was  
3 demonstrably inappropriate, and I will not consider it. The  
4 fact that the IP address would be subject to discovery later in  
5 the proceeding is immaterial.

6 Second, and in any event, there is clearly a factual  
7 dispute as to whether defendant's website contains the barriers  
8 that plaintiff alleges it does. Both sides have submitted  
9 affidavits arguing opposite sides of this factual question.  
10 Defendant's defense, therefore, is "properly tested in  
11 discovery and at summary judgment or trial." Indeed, the  
12 competing affidavits "reinforce the conclusion that discovery  
13 is necessary to determine defendant's compliance with the ADA  
14 or lack thereof." *Del-Orden v. Bonobos, Inc.*, 2017 Westlaw  
15 6547902 at page 13 (S.D.N.Y. December 20, 2017). See generally  
16 *London v. Polishook*, 189 F.3d 196, 198 to 199 (2d Cir. 1999),  
17 which stated that "where jurisdiction is so intertwined with  
18 the merits that its resolution depends on the resolution of the  
19 merits, the trial court should employ standard applicable to a  
20 motion for summary judgment," such that it "should dismiss such  
21 a claim for lack of jurisdiction only if there are no triable  
22 issues of fact."

23 The cases cited by Adagio, where courts dismissed for  
24 want of subject matter jurisdiction after a defendant argued,  
25 and plaintiffs did not challenge, that their websites were in

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1 compliance with the ADA are, thus, distinguishable.

2 See, for example, *Rizzy v. Hilton Domestic Operating*  
3 *Company, Inc.*, 2020 Westlaw 7000356 at page 6 (E.D.N.Y.  
4 August 11, 2020), which granted a motion to dismiss as moot  
5 where "plaintiff has not come forward with a shred of evidence  
6 to suggest that defendant's remedial actions have not corrected  
7 any issues with their websites," which was adopted at 2020  
8 Westlaw 6253713; and *Diaz v. Kroger Company*, 2019 Westlaw  
9 2357531 at page 4, (S.D.N.Y. June 4, 2019), reaching the same  
10 conclusion where "plaintiff did not dispute the factual  
11 assertions defendant's affiant made regarding defendant's  
12 efforts at ADA compliance."

13 For those reasons the motion remain was and remains  
14 denied. That is my ruling.

15 As I said, I'm happy to go off the record and proceed  
16 with the initial conference or we can remain on the record if  
17 counsel thinks that is appropriate.

18 Let me check with you, Mr. Mizrahi?

19 MR. MIZRAHI: I'm okay, your Honor, with getting off  
20 the record at this point. Thank you.

21 THE COURT: Ms. Neish?

22 MS. NEISH: That's also fine with us. Thank you.

23 THE COURT: Great. In that case, we'll go off the  
24 record. Rose, I thank you for your time here, and you're free  
25 to go. Thank you.

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1 THE REPORTER: Thank you, your Honor.

2 THE COURT: Have a good day.

3 (Adjourned)

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